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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 250

SUN OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The order of the Commission (Pet. App. A., pp. 6a–8a) is reported at 26 F.P.C. 521. The opinion of the Court of Appeals (Pet. App. A., pp. 1a–6a) is reported at 304 F. 2d 290.

JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1962 (Pet. App. A., p. 8a). A petition for rehearing, timely filed, was denied on May 29, 1962 (Pet. App. A, p. 9a, R. 85). The petition for a writ of certiorari was filed on July 14, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether a statement in a Commission order merely advising the recipients of that order of the existence of particular Commission regulations is reviewable under Section 19(b) of the Natural Gas Act.

STATUTES INVOLVED

Pertinent provisions of the Natural Gas Act are set forth in Appendix B to the Petition at pages 13a–14a.

STATEMENT

Petitioner, an independent producer of natural gas, sought review in the Court of Appeals for the Fifth Circuit of that portion of an order granting it temporary authorization to sell gas which advised it of the substance of existing Commission regulations proscribing certain types of rate-changing provisions in producer contracts. The Court of Appeals dismissed the petition, holding that petitioner was not presently aggrieved.

The pertinent facts may be stated as follows: Petitioner made a contract on June 10, 1958, for delivery of natural gas to Transwestern Pipeline Company from lands designated and described in the contract. The contract gave petitioner the unilateral right, by giving notice to Transwestern, to commit the gas from certain other described lands to the sales under the contract. After the Commission granted petitioner a certificate of public convenience and necessity to sell the gas produced from the acreage originally committed to the sale, the contract was filed as a rate schedule. The contract contains two price-changing provisions of the type known as indefinite escala-

tion clauses: (a) a so-called "favored-nations" clause, giving petitioner a contractual right to charge the highest price paid by the buyer (with certain exceptions, and with adjustments for difference in quality, pressure, gathering and compressing arrangements and other pertinent factors affecting price) in certain named counties in Texas and Oklahoma; and (b) a clause permitting a price renegotiation or redetermination every four years. Pet. App. A, p. 1a.

On March 3, 1961, the Commission adopted Order No. 232 (26 F.R. 1983), which, as amended on March 31, 1961, by Order No. 232A (26 F.R. 2850), modified Section 154.93 of its general regulations to declare "inoperative and of no effect at law" most indefinite escalation clauses in all producer contracts executed on or after April 3, 1961.[1] Sun's petition

[1] These orders added to Section 154.93 of the Regulations the following proviso (18 C.F.R. (Cum. Supp., 1962), 154.93):

"* * * That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are:

"(1) Provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;

"(2) Provisions that change a price to a specific amount at a definite date; and

"(3) Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount [paragraph (2)], change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and are in the area of the price in question."

to review those orders was dismissed by the Fifth Circuit, and review of that dismissal is now being sought in No. 249, this Term. The favored-nations and price renegotiation clauses in Sun's 1958 contract with Transwestern are the type of pricing provision so proscribed if, but only if, they are included in a contract executed on or after April 3, 1961.

On July 3, 1961, several months after the promulgation of this amendment to the general regulations, petitioner gave Transwestern notice, pursuant to the terms of the 1958 contract, that additional acreage and the gas to be produced therefrom were being committed to that contract. On July 12, 1961, petitioner applied to the Commission for an amendment to its certificate which would authorize the sale of gas produced from the additional acreage. Pending Commission action on this application, petitioner requested temporary authorization to sell the additional gas, on the ground that delay would result in the drainage of its reserves by wells on adjacent properties. Pet. App. A, p. 2a.

On September 21, 1961, the Commission issued a letter order granting petitioner temporary authorization to sell gas from the lands added to the contract by the unilateral notice to Transwestern, subject to a rate condition not challenged by petitioner. Pet. App. A, pp. 6a–8a. The order contained a statement that (Pet. App. A, p. 7a):

> • • • in the event that any document comprising the listed rate filing was executed on or after April 3, 1961, and contains provisions, either therein or by adoption of the terms and provisions of other agreements, for a change in

> rate other than those permitted by Section 154.93 of the Commission's Regulations, such rate change provisions shall be inoperative and of no effect at law and any tendered rate change under such provisions will be rejected.

Sun filed an application for "rehearing" of the order, requesting deletion of the above statement (Pet. App. A, p. 4a) (hereinafter referred to as "the "statement" or "the caveat"). By letter order of November 22, 1961, the Commission dismissed the application on the ground that Sun was not aggrieved by the order granting it the temporary authorization to make sales (Pet. App. A, p. 4a, R. 28).

In its petition for review, filed on January 12, 1962, Sun contended that the letter order issuing the temporary authorization purported to apply Orders No. 232 and 232A, that those orders exceeded the Commission's authority, that the statement complained of went beyond the Commission's regulations under the Natural Gas Act, and that the order deprived Sun of property without due process of law. (Pet. App. A, p. 4a).

The Commission moved to dismiss this petition, pointing out, *inter alia* (Pet. App. A, p. 5a):

> "Petitioner's claim of actual controversy appears to be based on the contention that the language it objects to in the certificate represents a Commission decision that Section 154.93 is applicable to this case. In fact, however, the Commission has made no such decision. The language complained of is 'boiler-plate' language which has been regularly used in numerous temporary certificates, not as a decision on the facts but as a means of calling the regulation to the attention of the applicant.

> "We are authorized to state that the language used was not intended to broaden, narrow, or apply the regulation, or to determine its applicability or scope, or to constitute a condition of the certificate. It is solely of an informatory nature, as was the abandonment language in the Sunray certificate (270 F. 2d 404 * * *) which called attention to a provision of the Act. Like that language with respect to Sunray, the language here in issue has no present impact on Sun."

In dismissing the petition for lack of aggrievement, the court explicitly adopted this language as the correct construction of the order sought to be reviewed and as a statement of applicable law.

ARGUMENT

The court below, we believe, was clearly correct in concluding that the caveat to which petitioner objects did not presently affect its rights and that the petition should, therefore, be dismissed. There is no conflict among the circuits on this point. Indeed the Tenth Circuit reached the same result with respect to a similar caveat. *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 270 F. 2d 404 (C.A. 10). Moreover, the case is of no general importance, as the Commission's regulations have subsequently been amended in such a way as to make it unlikely that the issue here presented will be a recurring one.[2] Hence, there is no warrant for review by this Court.

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[2] By Order No. 242, 27 F.R. 1356, the Commission amended its regulations to provide that, effective April 2, 1962, applica-

Petitioner contends (Pet. 8–10) that the order of September 21, 1961, granting it a temporary authorization for the sale of gas, contained a caveat which was intended to declare inoperative certain provisions of the contract under which the authorized sales were to be made. The court below properly rejected that contention. The caveat, *supra*, pp. 4–5, which petitioner seeks to have deleted was intended to be and is merely a cautionary reference to, and restatement of, the first proviso of Section 154.93 of the Commission's regulations under the Natural Gas Act, 18 C.F.R. (Cum. Supp., 1962) 154.93,[3] which declares, in pertinent part (25 F.P.C. at 610):

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tions by producers for certificates would be rejected if they were based on contracts entered into on or after that date containing any proscribed price-changing provisions and that such contracts would be rejected as rate schedules. Since the statement here complained of is embodied only in orders granting temporary authorizations or accepting rate schedules for filing and since such orders are no longer being issued for sales under contracts executed subsequent to April 2, 1962, and containing a proscribed escalation clause, it follows that the issue in this case could not arise in the future except in connection with a contract, if any there be, which was executed between April 3, 1961, and April 2, 1962, but for some reason has not yet been filed with the Commission.

However, we should point out that there are two similar cases now pending in the Court of Appeals for the Tenth Circuit which the Commission has moved to dismiss. *Texaco, Inc.*, v. *Federal Power Commission*, C.A. 10, No. 6947; *Pan American Petroleum Corp.* v. *Federal Power Commission*, C.A. 10, No. 6973.

[3] This proviso was promulgated by Order No. 232 (25 F.P.C. 379, 26 F.R. 1983, as amended by Order No. 232A, 25 F.P.C. 609, 26 F.R. 2850). Sun's petition to review those orders was dismissed in *Sun Oil Co.* v. *Federal Power Commission*, 304 F. 2d 293, petition for certiorari pending, No. 249, this Term.

> * * * That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; * * *

This proviso became effective on April 3, 1961. Starting in July 1961, the Commission began the practice of calling the proviso of the regulation to the attention of producers before they began new services by including the caveat in every order issuing a temporary authorization—whether or not the particular sales contract involved included any impermissible price-changing provisions. Indeed, petitioner itself had been granted temporary authorization for another sale by a letter order of August 29, 1961, which included the same caveat, although the contract there contained no indefinite pricing provision.[4] It is plain from the very language of the caveat—which is phrased entirely in the subjunctive and commences with the words "in the event that * * *"—that its function is purely informative and that it was not intended as a specific determination that any particular provision of any particular contract is inoperative.

Sun takes the position that since (a) the caveat refers to any "document" executed on or after April 3, 1961, whereas the proviso of the regulation relates

[4] Only fixed price escalations—which are clearly permissible—were included in the contract involved in the August 29 letter. It is of interest that the August 29, 1961, letter was on a printed form which the Commission has routinely used unless conditions were attached to the temporary authorization. See *infra*, App. p. 12. In the present case a price condition, not here involved, was attached.

only to any "contract" executed on or after that date, and since (b) Sun's rate filing contains a "document" (the unilateral notice of July 3, 1961), but (allegedly) not a "contract," executed after the crucial date, it follows that the caveat must be a specific and broadened application of the proviso to Sun's particular filing, rather than merely a notice of the proviso's existence. This contention has no merit. The caveat is not applicable to any document, even one executed on or after April 3, 1961, unless that document contains an indefinite pricing provision prohibited by the proviso to Section 154.93 of the regulations. To fall within this requirement, the proscribed indefinite pricing clause must be one contracted for after April 3, 1961, for Section 154.93 in terms makes inoperative only clauses contracted for after that date. If, therefore, as Sun contends, the gas from the acreage added in July 1961 was contracted for on June 10, 1958 (the date of its original agreement with Transwestern), then the indefinite pricing provisions of that contract would not fall within the language of the caveat. A contrary result would, of course, obtain if the unilateral notice to Transwestern, executed on July 3, 1961, were itself a "contract" incorporating by reference the indefinite pricing clauses of the 1958 agreement. The caveat itself, however, does not purport to decide that question. The question will be decided only if and when Sun files with the Commission a rate change pursuant to the favored-nation or price-redetermination clause in its contract. And at that time, the sole issue will be whether these clauses are proscribed by the proviso to the regulation, not

whether they fall within the advisory caveat in the order here challenged.

As the Court of Appeals expressly decided, the Commission's caveat was not intended to broaden the scope of the regulation. Its sum and substance is: "in the event any proscribed indefinite pricing clause is contained in the rate filing, even though by reference to an earlier agreement, it will be inoperative *if contracted after April 3, 1961.*" Its sole purpose and effect is to put recipients of temporary authorizations on notice of the regulation, spelling out one inherent legal effect of the regulation itself, *i.e.*, that it would not be avoided by the expedient of incorporating the language of a pre-April 3, 1961, contract into a contract executed after that date.[5]

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[5] Even if the court below had held that the statement constituted a Commission decision that pricing provisions of Sun's contract fell within the proscription of the regulation, Sun still would not be presently aggrieved. For there was no showing of the facts necessary to entitle it to increase its contract price under those provisions or any likelihood of the occurrence of such facts. Whether such a situation will ever arise is wholly speculative, for the prices provided by the other provisions of Sun's contract will be from 6 to 9 cents above the 17 cents per Mcf presently prevailing in that area, and an overriding condition of Sun's temporary authorization, not here in question, limits the rate it may collect to a maximum of 17 cents. Even apart from that limitation, the indefinite pricing provisions would contractually entitle Sun to a higher price, generally speaking, only if the prevailing price in the area should rise above the price fixed by the other provisions of Sun's contract.

None of the cases upon which petitioner relies (Pet. 10–11) is in conflict with the decision below, for in each of these cases there was immediacy or certainty of impact wholly absent here.

CONCLUSION

For these reasons, the petition for certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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SEPTEMBER 1962.

F.P.C. FORM 141(REVISED)

ADDRESS ALL COMMUNICATIONS TO THE SECRETARY

FEDERAL POWER COMMISSION
WASHINGTON 25

AUG 24 1961

Docket No. CI-61-1780
Sun Oil Company

AIRMAIL

Sun Oil Company
1608 Walnut Street
Philadelphia, Penna/lvania

Attention: Mr. C. E. Webber

Gentlemen:

Your statement, filed pursuant to Section 157.28 (c)(1) of the Commission's Regulations, of your intention to invoke said Section and initiate the service proposed in the [redacted] certificate application, Docket No. CI-1780, is hereby accepted.

CI-1780

You are also advised that the related rate schedule, identified by your statement pursuant to Section 157.28 (c)(2) of the Regulations and listed at the bottom of this letter, has been accepted for filing to be effective on the date of initial delivery. Please return the enclosed duplicate copy with such date inserted in the space provided. This acceptance of the rate schedule for temporary service is no assurance that it will be accepted by the Commission for permanent service.

In the event that any of the documents comprising the listed rate schedule contain provisions for future automatic adjustment in rates and charges based upon new or increased taxes or prices paid for gas by or to others, price redetermination provisions, or any similar provision, your attention is directed to the fact that such provisions, when invoked to change the effective rates and charges, will constitute a change in such rates and charges within the meaning of Section 4 (d) of the Natural Gas Act and Section 154.94 of the Commission's Regulations under such Act. The Act and the Commission's Regulations require that such changes be filed with the Commission not more than 90 nor less than 30 days prior to the proposed effective date thereof.

Further, in the event that any document comprising the listed rate schedule was executed on or after April 3, 1961 and contains provisions, either therein or by adoption of the terms and provisions of other agreements, for a change in rate other than those permitted by Section 154.93 of the Commission's Regulations, such rate change provisions shall be inoperative and of no effect at law and any tendered rate change under such provisions will be rejected.

This acceptance for filing shall not be construed as constituting approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in the rate filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which may be made in the final disposition of this proceeding or any other findings or orders which may be made in the final disposition of this proceeding or any other findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.

This constitutes all requisite temporary authorization to commence the sale of gas, but such authorization and acceptance of the rate schedule are without prejudice to such final disposition of the certificate application, as amended, as the record may require and, furthermore, once service is commenced under this authorization it may not be discontinued without permission of the Commission issued pursuant to the provisions of the Natural Gas Act.

Very truly yours,

J. H. GUTRIDE
Secretary

cc: Sun Oil Company
1700 "K" Street, N. W.
Washington 6, D. C.

Attention: Mr. P. E. Noble

Rate Schedule Designation
Sun Oil Company

Description of Document	Date of Letter of Transmittal	FPC Gas Rate Schedule No.	Supplement No.	Date of Initial Delivery
Notification	5-31-61 6-16-61	134	-	
Contract	4-14-61 6-16-61	134	1	

U.S. GOVERNMENT PRINTING OFFICE: 1962